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Summit Domain Sdn Bhd & Anor v Carillon Sdn Bhd

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HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-22NCVC-198–12 OF 2015
AHMAD KAMAL JC
27 FEBRUARY 2018

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Contract — Sale and purchase of land — Termination — Whether extension letter enlarged time — Whether termination of sale and purchase agreement with immediate effect without giving reasonable notice unlawful and invalid — Whether court judgment final decision

D

Land Law — Sale of land — Sale and purchase agreements — Termination — Whether extension letter enlarged time — Whether termination with immediate effect without giving reasonable notice unlawful and invalid — Whether court judgment final decision

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The defendant agreed to sell to the first plaintiff a piece of land held under GM 365 Lot 13, Mukim Pulai, Daerah Johor Bahru, Johor ('the said land') at the purchase price of RM137,544,477. The Second Schedule of the sale and purchase agreement ('the SPA') stated that the SPA was a conditional SPA. This was due to the fact that before the SPA was signed, three orang asli had sued the

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defendant and 12 other parties ('the said Civil Suit 158') as they sought a declaration that they were the holders of customary rights of the said land and the adjoining lands. Clause 2 of the Second Schedule provided that the sale and purchase therein 'shall be conditional upon the first plaintiff's solicitors receipt of a copy of the final decision of court'. Nevertheless, the final decision of court

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was not delivered when the one-year conditional period ended on 22 December 2014. Subsequently, by a letter to the defendant's solicitors dated 23 December 2014, the first plaintiff extended the period for the defendant to obtain the final decision of court. According to section 9 of the First Schedule of the said SPA, the deposit to be paid by the first plaintiff was

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RM13,754,447.70. The amount of interest which the second plaintiff had paid to the defendant was RM573,950.16. On 28 May 2015, the first plaintiff terminated the sale and purchase agreement and demanded for the refund of the RM1m earnest deposit and the interest of RM573,950.16 paid. The defendant challenged the termination of the said agreement and denied its

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liability to repay the amount claimed. Essentially, the defendant's defence was that the purported termination of the said SPA was unlawful and a declaration that the said SPA was still valid and enforceable and an order for specific performance of the said SPA upon the terms as directed by the court. The defendant also claimed damages for breach of contract.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim with costs of RM35,000 to be paid to the defendant by the plaintiff subject to allocator fee:

(1) Based on the evidence given by witnesses during the trial and contemporaneous documents tendered in court, it was discovered that when the plaintiffs exercised the option to extend the conditional period until such time the final decision or 'judicial decision' was made, time was at large and the plaintiffs, in order to terminate the said sale and purchase agreement needed to give a reasonable notice (see paras 42).

(2) The fact that the extension letter had notified the defendant that in spite of the extension of time given to the defendant 'the first plaintiff shall continue to have at its sole discretion the option to terminate the said SPA', it still had to be exercised within the ambit of the law after giving reasonable notice. The letter giving notice to the defendant stated that the SPA shall terminate with immediate effect without giving any reasonable notice was invalid and unlawful. Therefore, the said SPA was still valid and subsisting and capable of specific performance (see paras 46–47).

(3) The court agreed that the judgment dated 28 February 2017 was a final judgment notwithstanding the same was under appeal. The word judicial decision was not so defined in the said SPA, therefore, it must be construed in its plain and original meaning (see paras 62 & 65).

[Bahasa Malaysia summary

Defendan bersetuju untuk menjual kepada plaintif sebidang tanah iaitu GM 365 Lot 13, Mukim Pulai, Daerah Johor Bahru, Johor ('tanah tersebut') pada harga RM137,544,477. Jadual Kedua perjanjian jual beli ('perjanjian tersebut') menyatakan perjanjian tersebut adalah perjanjian bersyarat. Ini adalah disebabkan sebelum perjanjian tersebut ditandatangani, tiga orang asli telah mengambil tindakan dengan menyaman defendan dan 12 pihak yang lain ('tindakan Sivil 158) di mana mereka memohon satu deklarasi bahawa mereka merupakan pemegang hak anak negeri ke atas tanah tersebut dan tanah yang bersambungan dengan tanah tersebut. Klausa 2 dalam Jadual Kedua perjanjian tersebut telah menyatakan bahawa proses jual beli adalah tertakluk pada syarat peguamcara plaintif pertama menerima keputusan terakhir mahkamah. Walau bagaimanapun, tiada sebarang keputusan daripada mahkamah dibuat sehingga tempoh bersyarat berakhir pada 22 Disember 2014. Kemudiannya, melalui satu surat bertarikh 23 Disember 2014, plaintif melanjutkan tempoh bersyarat tersebut bagi defendan mendapatkan keputusan yang akan dibuat mahkamah. Berdasarkan seksyen 9 Jadual Pertama perjanjian tersebut, deposit yang dibayar oleh plaintif pertama adalah berjumlah RM13,754,447.70. Jumlah faedah yang perlu dibayar plaintif kedua kepada defendan berjumlah RM573,950.16. Pada 25 Mei 2015, plaintif

pertama telah menamatkan perjanjian tersebut dan menuntut pulangan deposit berjumlah RM1 juta dan bayaran faedah sebanyak RM573,950.16. Defendan mencabar tindakan plaintif menamatkan perjanjian tersebut dan menafikan tuntutan bayaran yang dibuat oleh plaintif pertama. Dalam pembelaan, defendan menegaskan penamatan perjanjian tersebut adalah tidak mengikut undang-undang dan perjanjian tersebut masih lagi sah dan berkuatkuasa dan satu perintah daripada mahkamah dipohon agar terma-terma perjanjian tersebut dilaksanakan. Defendan juga menuntut ganti rugi bagi perlanggararan kontrak dalam kes semasa.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan dengan kos RM35,000 dibayar kepada defendan oleh plaintif tertakluk pada fi alokatur:

(1) Berdasarkan keterangan saksi-saksi semasa perbicaraan dan dokumen-dokumen yang diberikan di mahkamah, adalah didapati plaintif telah menggunakan pilihan untuk melanjutkan masa bersyarat sehingga keputusan akhir atau keputusan kehakiman dibuat, masa adalah panjang dan plaintif hendaklah memberi notis yang sesuai dan munasabah sekiranya ingin menamatkan perjanjian jual beli tersebut (lihat perenggan 42).

(2) Fakta yang mengatakan surat lanjutan yang memaklumkan defendan bahawa lanjutan masa diberikan kepada defendan 'plaintif pertama boleh menggunakan budi bicara dengan menggunakan pilihan untuk menamatkan perjanjian tersebut', ianya hendaklah dilakukan berlandaskan undang-undang dengan memberi notis yang sesuai. Surat yang memberikan notis yang mengatakan perjanjian tersebut adalah dikira tamat secara serta merta tanpa memberikan sebarang notis adalah tidak sah dan menyalahi undang-undang. Oleh itu, perjanjian tersebut masih sah dan boleh diguna pakai untuk pelaksanaan tertentu (lihat perenggan 46–47).

(3) Mahkamah bersetuju bahawa penghakiman bertarikh 28 Februari 2017 adalah penghakiman yang terakhir tanpa mengira sekiranya terdapat rayuan dibuat terhadap keputusan tersebut. Istilah keputusan kehakiman adalah tidak dinyatakan maksudnya dalam perjanjian tersebut, oleh itu istilah tersebut perlulah diberi maksud secara biasa dan asal (lihat perenggan 62 & 65).]

Notes

For a case on sale and purchase agreements, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 5426.

For cases on termination, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7180–7182.

Cases referred to

Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd [2017] 3 MLJ 763, CA (distd)

Penang Development Corporation v Khaw Chin Boo & Anor [1993] 2 MLJ 161, HC (refd)

Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor [1992] 2 MLJ 68, HC (refd)

Sime Hok Sdn Bhd v Soh Poh Sheng [2013] 2 MLJ 149, FC (refd)

Legislation referred to

Companies Act 1965

Contracts Act 1950 s 47

Chok Chin You (Pusphalatha Naidu with him) (Pushpa Naidu & Co) for the plaintiff.

Wong Kim Fatt (R Vasanthan and Wong Boon Chong with him) (Julie Lim, Vasanthan & Co) for the defendant.

Ahmad Kamal JC:

INTRODUCTION

[1] The first plaintiff is a company incorporated pursuant to the Companies Act 1965 and has a registered address at 12A, Jalan Sahabat 1, Taman Emas, 86000 Kluang, Johor and a business address at No 4B, Tingkat 2 & 3, Jalan Sentol South Wing, Kluang Parade, 85000 Kluang, Johor.

[2] The second plaintiff is an individual with an address at No 2, Jalan 3/11, Taman Sri Kluang, 86000 Johor and at all material time is the first plaintiff's director.

[3] The defendant is a company incorporated pursuant to the Companies Act 1965 and has a registered address at Suite 1301, Tingkat 13, City Plaza, Jalan Tebrau, 80300 Johor Bahru, Johor and a business address at Wisma Cheng, No 49C, Tingkat 4, Jalan Segget, 80000 Johor Bahru, Johor.

[4] The plaintiffs' claim against the defendant is for rescission of the sale and purchase agreement dated 23 December 2013 ('the said SPA') and the repayment of RM1m earnest deposit and refund of the interest of RM573,950.16 paid to the defendant. The plaintiffs' cause of action against the defendant are set out in the plaintiffs' amended statement of claim dated 13 April 2017.

[5] The defendant then filed the statement of defence and counterclaim

against the plaintiffs' claim as set out in the defendant's amended statement of defence and counterclaim dated 2 May 2017. Essentially, the defendant's defence is that the purpoted termination of the said SPA is unlawful and a declaration that the said SPA is still valid and enforceable and an order for specific performance of the said SPA upon the terms as directed by the court. The defendant also claim damages for breach of contract.

THE TRIAL

[6] Trial for the suit took place on 17 May 2017 and 23 July 2017 which the plaintiffs and defendant called two witnesses each. The plaintiffs and defendant filed their written submissions. I gave my judgment on 13 November 2017. This is my judgment setting out the full reasons for my decision.

BACKGROUND FACTS

[7] The salient facts in this action which are not in dispute are as follows.

[8] By the said SPA, the defendant agreed to sell to the first plaintiff a piece of land held under GM 365 Lot 13, Mukim Pulai, Daerah Johor Bahru, Johor ('the said land') at the purchase price of RM137,544,477.

[9] As set out in the Second Schedule the said SPA is a conditional sale and purchase agreement. This is due to the fact that before the said SPA was signed, three orang asli have sued the defendant and 12 other parties in Johor Bahru High Court Civil Suit No 22-NCVC-158–06 of 2013 ('the said Civil Suit 158') in relation to the said land. In the said Civil Suit 158, the three orang asli have sued for a declaration that they are the holders of customary rights of the said land and the adjoining lands.

[10] In cl 2 of that Second Schedule, it is provided that the sale and purchase therein 'shall be conditional upon the first plaintiff's solicitors receipt of a copy of the Final Decision of Court (Conditional Period). In Clause 1.1 of the said SPA, the 'Final Decision of Court' is defined as 'the final and conclusive judgment or order reached by the trial court and or any Appellate or Federal courts in Malaya in favour of the Vendor in respect of (the said Civil Suit 158) against the Vendor and 12 others by (the 3 orang asli) with no further right of appeal whatsoever'.

[11] Further, in cl 4 of that Second Schedule, it provides that the said SPA 'shall become unconditional on the date the Final Decision of Court, is received by the First Plaintiff's Solicitors'.

[12] Therefore, by reason of cll 2 and 4 of that Second Schedule, the said SPA only becomes an unconditional contract if a condition precedent has been fulfilled. The condition precedent ('the said condition precedent') is the receipt of the final decision of court by the first plaintiff's solicitors.

[13] In cl 5 of the Second Schedule, it provides that if 'there is no Final Decision of Court and or judicial decision in favour of the Vendor within one (1) year from the date of this Agreement, the Purchaser shall either have the option to extend the Conditional Period or have the option to terminate this Agreement and upon notice being given to the Vendor, this Agreement shall terminate and be of no further force or effect and the Vendor shall within fourteen (14) days thereof refund to the Purchaser all sums paid by the Purchaser to the Vendor free of interest ...'.

[14] According to section 9 of the First Schedule of the said SPA, the deposit to be paid by the first plaintiff is RM13,754,447.70 comprising of: (a) an earnest deposit of RM1m; and (b) a balance deposit of RM12,754,447.70.

[15] As stated in cl 2.2(a) of the said SPA, the earnest deposit of RM1m was already paid before the said SPA was signed.

[16] Under cl 2.2(b) of the said SPA, the balance deposit of RM12,754,447.70 was to be held by the Chambers of Jesvant Singh (the first plaintiff's solicitors) as stakeholder, while waiting for the final decision of court. However, this term was later varied by a memorandum of understanding dated 23 December 2013.

[17] Under the memorandum of understanding, it was agreed between the defendant and the first plaintiff's director that instead of the first plaintiff paying to Chambers of Jesvant Singh that balance deposit of RM12,754,447.70, the second plaintiff would be paying interest to the defendant every two month once, at the rate of 3% calculated on that balance deposit.

[18] A power of attorney was also executed by the defendant in favour of the first plaintiff, and annexed to the said SPA.

[19] The one year period of conditional period as is stated in cl 5 of that Second Schedule ended on 22 December 2014. The final decision of court was however not delivered to the Chambers of Jesvant Singh on or before 22 December 2014, as provided in that cl 5.

[20] Thereafter, by a letter to the defendant's solicitors dated 23 December

2014, the first plaintiff extended the time period for the defendant to obtain the final decision of court.

[21] The amount of interest which the second plaintiff has paid to the defendant in accordance with that memorandum of understanding in this matter is RM573,950.16.

[22] Later on, by a notice of termination of the Chambers of Jesvant Singh to the defendant's solicitors dated 28 May 2015, the first plaintiff terminated the said SPA, and the plaintiffs demanded from the defendant for the refund of the RM1m earnest deposit and the interest of RM573,950.16 paid.

[23] Subsequently, the plaintiffs on 12 August 2015, again demanded from the defendant for the payment of RM1,573,950.16.

[24] Later on, the first plaintiff and the second plaintiff engaged M/s Pushpa Naidu & Co as their lawyers. M/s Pushpa Naidu & Co then sent a notice of termination to the defendant dated 26 October 2015 to terminate the said SPA and also demanded for payment of RM1,573,950.16.

[25] By the letters from the defendant's solicitors dated 27 August 2015 and 9 November 2015, the defendant has challenged the termination of the said SPA and denied its liability to repay that amount of RM1,573,950.16.

THE PLAINTIFFS' CASE

[26] The letter dated 23 December 2014 issued by the first plaintiff's solicitors to the defendant's solicitors constitutes a notice as required under special conditions cl 5 of the Second Schedule and cl 23.1(c) of the said SPA which extended the conditional period in relation to the delivery of the final decision of court.

[27] The said extension letter has given the first plaintiff the option to terminate the said SPA. After that letter was issued to the defendant's solicitors, neither the defendant nor its solicitors has objected to the letter. Such being the case, the defendant itself has accepted that it was only given a conditional extension of time to obtain the final decision of court.

[28] The plaintiffs contended the said extension letter dated 23 December 2014 does not vary the terms of the said SPA. It notified the defendant that the first plaintiff was exercising the option to extend the conditional period but at the same time the first plaintiff would still have the sole discretion to terminate the said SPA.

[29] The plaintiffs further contended the said extension letter dated 23 December 2014 does not enlarge time but has only granted to the defendant a conditional extension of time to obtain the final decision of court.

[30] The plaintiff maintain at all times, both before as well as after the issuance of the said extension letter dated 23 December 2014, time was, and is of the essence of the said SPA.

[31] The notice of termination by Chambers of Jesvant Singh dated 28 May 2015 is valid because the extension of time which was granted to the defendant by the said letter of extension dated 23 December 2014 is a conditional extension of time which conferred on the first plaintiff the sole discretion to terminate the said SPA and at all times, time is and was of the essence of the said SPA and thus the first plaintiff was entitled to terminate the said SPA immediately by this notice of termination and without having to give reasonable notice to the defendant before terminating the said SPA.

[32] The notice of termination by M/s Pushpa Naidu & Co dated 26 October 2015 is the second notice of termination that was issued by the first plaintiff to avoid any argument by the defendant that it has not been served with any notice of termination. The law does not prohibit the first plaintiff from issuing two separate notices of termination to terminate the said SPA.

THE DEFENDANT'S CASE

[33] The defendant submits that the said SPA is subject to the condition that 'Final Decision of Court and/or judicial decision in favour of the defendant shall be obtained within 1 year from the date of the agreement'.

[34] The defendant contended by giving the said extension letter dated 23 December 2014, time is no longer of the essence and is at large.

[35] The defendant further submits that although item (ii) of the said extension letter dated 23 December 2014 stated that:

> the purchaser (the plaintiff) shall continue to have at its sole discretion the option to terminate the SPA or have the option to extend the Conditional Period,

time is no longer the essence and reasonable notice must be given before termination.

[36] The defendant contended the exercise of the option to extend without fixing a time for performance had rendered time at large and the plaintiff's 'sole discretion the option to terminate the said SPA' has to be exercised within the

ambit of the law after giving reasonable notice.

[37] The defendant further submits that the plaintiffs had failed to comply with s 47 of the Contracts Act 1950 to give reasonable notice before terminating the said SPA.

[38] The defendant submitted the judgment of the High Court dated 28 February 2017 in respect of the said Civil Suit 158 is a final judgment, although the same is under appeal.

[39] The defendant further submitted the word 'judicial decision' is not so defined, hence is must be construed in its plain and original meaning. Therefore, based on the court's judgment dated 28 February 2017, the defendant has obtained a final judicial decision.

[40] Therefore, the defendant submits that the termination with immediate effect by the plaintiffs' solicitors are unlawful and invalid contrary to s 47 of the Contracts Act 1950.

ISSUE

(i) whether the said extension letter dated 23 December 2014 enlarged the time; and

(ii) whether the two purported termination with immediate effect without giving prior reasonable notice are unlawful and invalid contrary to s 47 of the Contracts Act 1950.

FINDINGS OF THIS COURT

[41] Having fully and carefully considered the plaintiffs' case as well as the defendant's and issues raised in the written submissions, I now come to a decision as follows.

[42] Based on the evidence given by witnesses during the trial and contemporaneous documents tendered in court, it is my view that when the plaintiffs exercised the option to extend the conditional period until such time the final decision and/or judicial decision is obtained, time is at large and the plaintiffs, in order to terminate the said SPA, need to give reasonable notice.

[43] In *Sime Hok Sdn Bhd v Soh Poh Sheng* [2013] 2 MLJ 149, the Federal Court at p 168 para 30 held that:

> ... the contract was silent as to the time for performance. The law provided that the

respondent must perform that promise within a reasonable time.

[44] Further, in *Penang Development Corporation v Khaw Chin Boo & Anor* [1993] 2 MLJ 161, Mohamed Dzaiddin J (as he then was) at pp 163–164 held as follows:

> First, it is common ground that the written agreement did not fix any time for the performance of the contract. So when no time is specified, the contract must be performed within a reasonable time — s 47 Contracts Act 1950. What is 'a reasonable time' is, in each particular case, a question of fact (ibid). However, the *plaintiff cannot arbitrarily fix the time. It must be reasonable having regard to the state of things at the time when notice was given*. In *Stickney v Keeble,* the English House of Lords held as follows:
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> > Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, and in determining the reasonableness of the time so limited the court will consider not merely what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay of the vendor and the attitude of the purchaser in relation thereto.
>
> Secondly and more importantly, the amended statement of claim has failed to plead that the plaintiffs have given notice to the defendant to complete the delivery of vacant possession within a reasonable time. What had been pleaded was merely an allegation that the defendant had failed to deliver vacant possession within reasonable time (para 5). *In my opinion, a written notice giving time to complete the delivery is necessary since time by which the contract was to be completed has not been stipulated, nor made the essence of the contract*. (Emphasis added.)

[45] In the light of the above authorities, the law engrafts on the contract a condition that reasonable time in the absence of any specific time provided in the contract will be the essence of the contract and if the contract is not performed within reasonable time by any of the parties, the said party will be deemed to be guilty of breach of duty or breach of contract.

[46] The fact that the said extension letter dated 23 December 2014 had actually notified the defendant that in spite of the extension of time given to the defendant 'the first plaintiff shall continue to have at its sole discretion the option to terminate the said SPA', to my mind it still has to be exercised within the ambit of the law after giving reasonable notice ie s 47 of the Contracts Act 1950.

[47] In the instant case, it is very clear that the letter dated 28 May 2015 from Chambers of Jesvant Singh to M/s Ang & Co giving notice to the defendant that the said SPA shall terminate with immediate effect without

giving any reasonable notice, is invalid and unlawful. To my view, the said SPA is still valid and subsisting and capable of specific performance (see *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68).

[48] The plaintiffs has relied on the decision of the Court of Appeal in *Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd* [2017] 3 MLJ 763 to support its case that time is not at large and time was, and is of the essence of the said SPA.

[49] However, after perusing *Nor Azlina*'s case contrary to the submission of the plaintiffs, I find that the Court of Appeal's decision in *Nor Azlina* as submitted by the plaintiffs is distinguishable.

[50] The facts of the case clearly show that cl 5 of the agreement in that case provided that if the defendant fails to comply with the requirement of obtaining the approvals of the relevant authorities, *the agreement shall automatically be terminated and neither party shall have any claim against the other* (para 4(c) at p 768).

[51] The above salient fact is clearly distinguishable as in our case where relevant clause provided that 'in the event that there is no final decision of Court and/or judicial decision in favour of the defendant within 1 year from the date of the agreement, the first plaintiff shall either have the option to extend the conditional period or have the option to terminate the agreement'.

[52] By letter dated 23 December 2014, the plaintiffs' solicitor wrote to exercise the option 'until such time that the final decision of Court and/or judicial decision of the vendor (the defendant) is obtained'. Therefore, it is my decision that by such extention and without fixing a time for performance time is no longer of the essence, and is at large.

[53] From the witnesses testimonies in court, I find that the position of the defendant on the unlawful immediate termination of the said SPA is clear from the evidence of PW2, DW1 and DW2. I find that the plaintiff had no intention to complete the sale and purchase of the land and the plaintiffs are in breach of the said SPA.

[54] The plaintiffs' second and last witness is Mr Jesvant Singh a/l Chanan Singh ('PW2'), a senior advocate and solicitor who prepared the said SPA for the plaintiffs. PW2 had agreed that 'there is no time limit' to the obtaining of the final decision of court and/or judicial decision in favour of the defendant. His evidence are as follows:

See p 39 of the notes of evidence

WKF: ... the engagement must be performed within a reasonable time. You agree?

PW2: I agree

WKF: What is reasonable, ultimately, it is for the court to decide. So I refer to the next letter at page 95, My Lord. Page 95 is the letter where you terminate immediately, correct?

PW2: Correct

WKF: Without giving reasonable notice to perform

PW2: Yes.

WKF: In your statement also, you said there is a challenge to the effect of this letter, to the validity of this letter. The challenge is at page 99, the reply. Page 99 is a letter written by Ang & Co. to your firm.

PW2: Yes, correct.

WKF: And it has referred to the letter, the first line of this letter. We refer to the above matter and to your letter dated 28/5/2015 ...

That is the letter in which you terminate the Agreement immediately.

PW2: That's right.

WKF: Without giving notice.

[55] From the above evidence of PW2, it clearly shows that PW2 had agreed that he did not give the defendant reasonable time to execute the agreement via his letter dated 28 May 2015.

[56] I am of the view that based on evidence of PW2 above, it is patently clear that the agreement was unlawfully terminated on 28 May 2015, without giving any reasonable notice under s 47 of the Contracts Act 1950.

[57] The defendant's first witness, Dr Cheng Chean Chiong, a director of the defendant ('DW1') had stated the two termination letters with immediate effect are unlawful and that the plaintiffs are not entitled to claim the sum of RM1.57m. With reference to the extension of time by the plaintiffs, DW1 stated that there is no time limit imposed by the plaintiffs as follows:

See pp 63–64 of the notes of evidence

WKF: So, in the events that have occurred, they have extended the Agreement. Look at page 94 of the Common Bundle, My Lord. Look at para 1. May I read, My Lord, because this is important to us: '... that pursuant to Clause 5 ...' which I referred earlier '... of the Second Schedule of the Sale and Purchase Agreement dated 23.12.2013. ... as there is yet no Final Decision of Court and/or Judicial Decision

in favour of the Vendor within one (1) year from the date of the SPA, our client is now exercising their option to extend the Conditional Period until such time that the Final Decision of Court and/or Judicial Decision in favour of the Vendor is obtain ...' is there any time limit for you to perform that? Is there a time limit imposed for him to get the order? Did they impose the time limit? Is there a time limit there, in the letter/

DW1: Tidak ada, Yang Arif

WWF: Oh, you don't understand?

DW1: Tidak ada

WKF: Oh, there is no time limit. Now, you said that there is no time limit, and look at page 95. It is a letter dated 28.5.2015 which terminated the Agreement with immediate effect. Did this letter give you any reasonable notice?

DW1: Tidak ada, Yang Arif.

WKF: And then, there is a claim for RM1.57 million at the end of the page. Are they entitled to claim this money from you?

DW1: Tidak layak, Yang Arif.

[58] DW1 also contended that the two immediate termination of the SPA are unlawful.

See pp 64–65 of the notes of evidence

WKF: And I refer witness to page 99. It is a letter from your solicitors Ang & Co. Correct?

DW1: Ya, Yang Arif.

WKF: And the letter here, 4th paragraph, may I read, My Lord? At the expiry of 1 year on 22.12.2014, your client exercises the option to extend. In the circumstance it is our client's contention that the validity of the agreement has been extended. That been the case, time has been at large and your client's purported termination on 28th ... [so and so] ... is unlawful. Your lawyer has put your position to them? In this paragraph?

DW1: Apakah soalannya?

WKF: That the Agreement ... that the termination is unlawful.

DW1: Ya, Yang Arif.

WKF: And the last paragraph, since you said the termination is unlawful, your lawyer wrote that the Agreement is still valid and subsisting, the sale and Purchase Agreement.

DW1: Ya, Yang Arif

WKF: And look at page 100, where my learned friend referred you to earlier. Page 100 is the second letter of termination, correct?

DW1: Ya. Yang Arif.

WKF: And your solicitors have replied to this letter at page 102, Common Bundle. The last paragraph, third paragraph says the termination is unlawful.

DW1: Ya, Yang Arif.

WKF: Page 85, the Green Bundle, Ikatan Dokumen Defendant, which my learned friend referred to, page 85 and page 86. This second notice 26 October 2015 was referred to in first paragraph of the letter and your solicitors have replied in para 2. Para 2: 'We are instructed by our client that your said notice is null and void and of no effect ... is that your position, Dr Cheng?

DW1: Ya, Yang Arif.

WKF: And is given the reason at paragraph (a) and (b).

DW1: Ya, Yang Arif.

WKF: Look at page 86, the last para, page 85, para 5.

Where your solicitors took the position that the balance deposit of RM12,754,447-70 ...

CCY: Yang Arif, I never crossed on the point.

WKF: But he talked about the money earlier, My Lord. So it is incidental.

Y.A: But you are talking ... but you crossed him on page 85?

CCY: I think I did. Very well.

WKF: That's fair, I just said that this money should not be paid to the ... by your solicitors pursuant to ... shall not be released to you. That's our position, shall both be released to the plaintiff, correct?

DW1: Ya, Yang Arif.

[59] The second plaintiff Tan Sri Tan Seng Leong ('PW1'), under cross-examination admitted that he guaranteed the payment of the balance deposit (RM12.5m) in the event the first plaintiff does not pay. Therefore, it is my considered view that he is therefore personably liable for this sum of money to the defendant since the said SPA was invalidly or unlawfully terminated.

See p 27 of the notes of evidence

WKF: Now I refer Tan Sri to the Amended Plaintiff's Synopsis and Chronology of Case. Marked as 'C', Yang Arif, Paragraph 4.

Tan Sri, look at paragraph 4 here. I will read to you. 'The second plaintiff and the Vendor entered into a Memorandum of Understanding (MOU) whereby an interest of 3% per annum on the balance deposit must to be paid every two months and the second plaintiff guaranteed the payment of the balance deposit in the event the Purchaser (1st Plaintiff) does not pay', straightforward this is your case?

YA: Correct? Betul?

PW1: Yes, Yang Arif.

Y.A: Ok. Now he agreed. Dia kata betul.

[60] PW1 agreed that the said SPA is extended to 22 June 2015 when it was unlawfully terminated on 28 May 2015.

See p 13 of the notes of evidence

WKF: So in other words, do you agree Tan Sri, at the very least, these Sale and Purchase Agreement is extended to the 22.6.2015 that covered by period of the interest?

PW1: Yes.

WKF: Can you remember when did you terminate the contract immediately? At page 95, Bundle 'A'. My Lord. I'll just read to you, this is 20.5.2015 (should be 28.5.2015) and the termination was with effect on the same day because you used the word 'immediate'.

PW1: Yes.

WKF: So, 20.5.2015 (should be 28.5.2015), it takes effects, Tan Sri?

PW1: (inaudible)

WKF: You terminated it or attempted termination this before 22.6.2015. The agreement still valid on the 22.6.2015. You terminated before or earlier. How do you explain that?

PW1: The cheque payment was made in the month of April 2015. We have made payment for the month of April, May and June. Nota only paid 3 months but we paid at the month of April.

WKF: But the agreement as you said earlier just now when you answer, It valid at least up to 22.6.2015.

PW1: We terminated on the 28.5.2015.

[61] The next issue is whether the judgment dated 28 February 2017 is a final decision. It is not disputed by both parties that the claim by three orang asli against the defendant in the said Civil Suit 158 was dismissed by the High Court.

[62] I agree with the defendant's submission that the judgment is a final judgment notwithstanding the same is under appeal. It should be noted that the said land is not subject to appeal and the defendant has registered title under its name free from encumbrances.

[63] The defendant's first witness is Dr Cheng Chean Chiong ('DW1'), a director of the defendant gave evidence under cross-examination that the defendant won the case against the orang asli and that the termination of the said SPA was unlawful:

See p 61 of the notes of evidence

CCY: Please now look at page 100 of the Common Bundle of Documents. Do you agree that if Summit Domain Sdn. Bhd. has not validly terminated the Sale and Purchase Agreement by way of the letter at page 95, it has validly terminated the Sale and Purchase Agreement with this letter at page 100?

DW1: Tak setuju kerana ia tidak sah, Yang Arif.

CCY: Mr. Cheng, I put it to you that Carillon Sdn. Bhd. has a legal duty to repay the amount that is claimed at page 100 of the Common Bundle of Documents.

DW1: Tak setuju kerana ia tidak sah, Yang Arif.

CCY: Mr. Cheng, please look at your own witness statement, question 23. Are you saying that Carillon Sdn Bhd. has actually obtained a court order in its favour in Civil Suit 158 on 28*th* of Februaru, this year?

DW1: Kes ini telah diberikan keputusan dan kami mengikut keputusan yang diberikan dan kami menang dalam kes tersebut, Yang Arif.

[64] In the letter of extension dated 23 December 2014, the plaintiffs have exercised the option to extend the conditional period not only 'until such time that the Final Decision of Court', but until such time that the 'judicial decision' in favour of the vendor (the defendant) is obtained.

[65] I noticed the word 'judicial decision' is not so defined in the said SPA, therefore, it is my view that it must be construed in its plain and original meaning. Hence, based on the court's judgment dated 28 February 2017, the defendant has obtained a final judicial decision.

CONCLUSION

[66] Based on the above findings, the clear legal consequences are that the two terminations with immediate effect issued by the plaintiffs' solicitors without giving prior reasonable notice to the defendant, are clearly unlawful and invalid and are contrary to the statutory provisions of s 47 of the Contracts Act.

[67] Accordingly, I dismissed the plaintiffs' claim and allowed the defendant's counterclaim and ordered costs of RM35,000 to be paid to the defendant by the plaintiffs subject to payment of an allocator fee.

A *Plaintiff's claim dismissed and defendant's counterclaim allowed with costs of RM35,000 to be paid to defendant by plaintiff subject to allocator fee.*

Reported by Mohd Kamarul Anwar

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